prevalent of requiring the use of teams along with personal services. BLACKSTONE, COMMENTARIES, Bk. 1, p. 358. Thus, in whichever light we view the conscription of wagons and teams, whether as a tax or as a duty owed the state, the correctness of the decision in *Galoway* v. *State, supra,* seems unquestionable. See also *Goddard, Petitioner,* 16 Pick. (Mass.), 504, 28 Am. Dec. 259. The right to make compulsory use of timber, gravel and other materials in road work, taken from land outside the limits of the highway, must be distinguished from the requisition of tools and animals. The former is purely an exercise of the power of eminent domain, an unequal burden falling upon those individuals whose property is taken, and compensation must be made for the materials taken. *Posey Township* v. *Senour,* 42 Ind. App. 580. See note 42 L. R. A. (N. S.) 1045.

The court in *Galoway* v. *State, supra,* has attempted to draw a distinction between exacting a contribution of the services of the wagon and horses and the appropriation of the feed, arguing that the former is merely an impressment for temporary service while the latter leaves nothing to be returned to the owner. The validity of this distinction is certainly open to question. The state can require a man's labor or the use of his tools and animals for a reasonable period, and this particular labor, and this particular use of his property during the period of service, are gone just as absolutely as any feed consumed by his horses. Further, if the burden imposed by the statute is considered in the nature of a tax, and it is submitted that it should be, there is absolutely no basis for declaring the appropriation of the feed unconstitutional. In the early days of our history, commodities were commonly received in payment of taxes, and at the present time the legislature may require taxes to be paid in money, labor or any other medium that it may see fit. *William's Case,* 3 Bland Ch. (Md.) 186, 255; *Libby* v. *Burnham,* 15 Mass. 144; *Lane County* v. *Oregon,* 7 Wall. 71; COOLEY, TAXATION, p. 15. J. W. T.

EFFECTIVENESS OF ORAL CONTRACTS, WITHIN THE STATUTE OF FRAUDS.—In *Morris* v. *Baron and Co.,* (House of Lords, 1917), 87 L. J. R. (K. B.) 145, plaintiff and defendant had entered into a contract of sale and plaintiff, as vendor, had delivered part of the goods agreed upon. Delivery of the remainder would have been a condition precedent to any recovery by the plaintiff. This contract, however, was followed by a second one, not in writing, whereby plaintiff was absolved from delivering the rest of the goods, but by which he agreed that he would deliver them if the defendant should so request. Thereafter plaintiff brought this action for the "price" of the goods delivered. The defendant set up, by way of counterclaim, plaintiff's failure to deliver the rest of the goods as requested under the second contract. The court held that the second contract, although not in writing, absolved the plaintiff from having to deliver all the goods under the first contract, and therefore allowed him to recover for the goods delivered, but that, because it was not in writing, the defendant could not maintain his counterclaim for breach of it.

In *Noble* v. *Ward,* 35 L. J. Ex. 81, L. R. 2 Ex. 135, the defendant had contracted to buy goods from the plaintiff and was sued for his refusal to accept and pay for them. He defended on the ground that this contract had been rescinded by a later oral one substituted for it. The court held that because the second agreement did not conform to the requirements of sec. 17 of the statute of frauds it did not have the effect, as a matter of law, of rescinding the first one. This case was interpreted in *Morris* v. *Baron and Co.* as holding, at most, only that a variation by agreement not in writing would not be recognized, and that it should have been left to the jury to say whether the parties intended by their new oral contract to rescind the prior written one. It was distinguished from the principal one on the ground that the parties did intend by their second contract to rescind the first one, and that such rescision would be effective even though not in writing.

There is much conflict in the decisions as to whether a contract within the Statute of Frauds can be varied by oral agreement as to time of performance and kindred matters. *Neppach v. Oregon, etc. R. R.* 46 Ore. 374, 7 Ann. Cas. 1035, and cases there collected, (holding that the oral extension of time will be recognized as valid when it has been acted upon, at least.) Actual rescission of a contract by oral agreement is effective, even though the contract itself be one within the Statute. *Goman* v. *Salisbury,* 1 Vern. 240; *Proctor* v. *Thompson,* 13 Abbott N. C. (N. Y.) 340. So also, although the authority is scant, a contract in writing as required by the Statute can be rescinded by the substitution of an oral contract, if the parties intend to rescind thereby. *Goss* v. *Lord Nugent,* 5 B. and Ad. 58 (dictum); *Gilbert* v. *Hall,* 1 L. J. Ch. 15 (at least in equity); *Reed* v. *McGrew,* 5 O. 376; *Dearborn* v. *Cross,* 7 Cow. (N. Y.) 48. The court in the principal case evidently treated the second contract as evidencing an intent to abrogate the original contract.

The court also distinguished the principal case from *Noble* v. *Ward* on the ground that the statute under which that case was decided declared that a contract not in conformity with it should not be "allowed to be good," while the Sale of Goods Act, which governed *Morris* v. *Baron and Co.,* provided only that it should not "be enforced by action." This at once raises the question whether there is not an intent behind the Statutes broader than their literal wording might imply. The preamble of the original Statute might lead one to suppose that its object was to do away with certain oral contracts, "For prevention of many fraudulent practices which are commonly endeavored to be upheld by Perjury and Subornation of Perjury." This is the view of the court in *King* v. *Welcome,* 5 Gray (Mass.) 41. The action was in *quantum meruit* for services rendered, and the defense was that they were rendered under an oral contract not to be performed within a year, which plaintiff had broken. Although the Massachusetts statute provided only that no action should be brought on such a contract, the court held that, "So far as it concerns the prevention of fraud and perjury, the same objection lies to the parol contract, whether used for the support of, or in defense to an action. The gist of the matter is, that,

in a court of law and upon important interests, the party shall not avail himself of a contract resting in words only, as to which the memories of men are so imperfect, and the temptations to fraud and perjury so great." "Looking at the mere letter of the statute, the suggestion is obvious, that no action is brought upon this contract. * * * The difference, it is clear, is not one of principle." Accordingly the use of the oral contract even in defense was denied. So also in *Scotten* v. *Brown,* 4 Har. (Del.) 324, it was said, "The danger in this respect (false testimony) and the necessity of the rule which the statute prescribes, are equally strong, whether the suit is directly upon the contract, or the contract is sought to be proved incidentally and by way of defense." *Acc., Bernier* v. *Cabot Mfg. Co.,* 71 Me. 506. A vendee in possession under an oral contract of sale can not set up the contract in defense to an action of ejectment. *Zeuske* v. *Zeuske,* 55 Ore. 65, Ann. Cas. 1912 A. 557, and cases there collected.

On the other hand, Blackstone's sole comment is that "The statute of frauds and perjuries (was) a great and necessary security to private property." COMMENTARIES, Bk. 4, *p. 440. If protection to property was the motivating intent of the Statute and its true justification, the distinction based on verbiage that is made in *Morris* v. *Baron and Co.* is eminently proper. This is the view, undoubtedly, of most courts. The opinion in *Gray* v. *Gray,* 2 J. J. Marshall (Ky). 21, thus expresses it, "The letter of the statute of frauds does not declare a parol contract for land void, it only refuses to give a remedy for the enforcement or breach of such a contract; but the contract itself may for the purpose of defense, be used as a shield to protect the defendant against unconscionable demands, and claims growing out of the contract." In accord with this doctrine, it is generally held that in a suit on the common counts a contract may be used in defense, even though it does not accord with the Statute. *Philbrook* v. *Belknap,* 6 Vt. 383; *Weber* v. *Weber,* (Ky.), 76 S. W. 507; *Laffey* v. *Kaufman,* 134 Cal. 391; *McKinney* v. *Harvie,* 28 Minn. 18; *Sims* v. *Hutchins,* 8 S. & M. (Miss.) 328; *Schechinger* v. *Gault,* 35 Okla. 416, (even though the Statute declares it "invalid").

This is not usually the rule, however, where the statute says that such a contract is "void." *Donaldson's Admr.* v. *Waters' Admr.* 30 Ala. 175; *Nelson* v. *Shelby Mfg. Co.,* 96 Ala. 515; *Scott* v. *Bush,* 26 Mich. 418; *Lemon* v. *Randall,* 124 Mich. 687; *Salb* v. *Campbell,* 65 Wis. 405. Neither is it the rule when the defendant is himself in default under the contract. In such cases, however, the inadmissability of the contract is not due to the Statute but because the defendant's acts have rescinded it. *Jackson* v. *Stearns,* 58 Ore. 57; *Booker* v. *Wolf,* 195 Ill. 365; *Burlingame* v. *Burlingame,* 7 Cow. (N. Y.) 92; *Shute* v. *Dorr,* 5 Wend. 204 (on the double ground that it had been rescinded and that it was "void" under the N. Y. Statute); *Cf. Jellison* v. *Jordan,* 68 Me. 373 (apparently because of the Statute). In these cases the recovery is allowed, of course, not for breach by the defendant of the oral contract, but because of his implied promise arising out of unjust enrichment. Loss sustained by the plaintiff, not resulting in enrichment of the defendant, can not be recovered. *Gazzam* v. *Simpson,* 114 Fed. 71;

Dowling v. *McKenney*, 124 Mass. 478. It seems that contracts which do not accord with the Statute may nevertheless have an effect in showing the intent in an escrow. See *supra*, p. 569 ff. The fact that a contract is unenforceable because not in writing does not prevent its use to show value in actions of quasi-contract, *Murphy* v. *De Haan*, 116 Iowa 61; *contra*, because "void" by statute, *Sutton* v. *Rowley*, 44 Mich. 112; or to show the amount of rent due, *Evans* v. *Winona Lumber Co.*, 30 Minn. 515; *Steele* v. *Anheuser-Busch Assn.*, 57 Minn. 18; or to show damage resulting from tort by a third party, *Burruss* v. *Hines*, 94 Va. 413; or that a settled claim had a real basis, *Michels* v. *West*, 109 Ill. App. 418; or to show reason for money paid to defendant, *Coughlin* v. *Knowles*, 7 Met. (Mass.) 57. It is unnecessary to cite authority to the effect that parties unconnected with a contract can not collaterally attack it as "void." This is true even where the defendant's liability results only from performance by plaintiff of a contract which could not have been enforced because of the Statute. *Beal* v. *Brown*, 13 Allen (Mass..) 114. In suit for specific performance of a written contract to sell land the defendant was allowed to show that the plaintiff had orally contracted to re-sell the land to him. *Frith* v. *Alliance Investment Co.*, 49 Can. Sup. Ct. 384, Ann. Cas. 1914 D. 458. It is also very generally held that the Statute must be affirmatively pleaded as a defense, since the contract gives a legal right until advantage is taken of the Statute. *Crane* v. *Powell*, 139 N. Y. 379; *Citty* v. *Manufacturing Co.*, 93 Tenn. 276. As to the interpretation of the Statute, therefore, a statement from *Evans* v. *Winona Lumber Co.*, *supra*, is applicable. "This rule may not be logical—very likely it is not, as an original proposition; but that it is the rule established by the authorities there can be no doubt." J. B. W.

Scope of the Doctrine of Rylands v. Fletcher.—A study of the doctrine of *Rylands* v. *Fletcher*, L. R. 1 Ex. 265, logically resolves itself into two considerations: first the theoretical merits of the rule, and second, its scope. For a discussion of the first aspect of such an analysis, see 29 Harv. L. Rev. 801; 2 Cooley, Torts, 1183-1187; Bigelow, Torts, 492. It is the purpose of this note to consider the scope of this "doctrine of absolute liability" as now applied by the English Courts.

In *Rylands* v. *Fletcher*, D had constructed a reservoir on his land, the water of which escaped, due to no negligence on his part, damaging P's property. It was *held* that D was liable, on the theory that "the person who brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so he is *prima facie* answerable for all the damage which is the natural consequence of its escape." In *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914], 3 K. B. Div. 772, this principle was extended to apply where the defendant brings the dangerous agency upon land occupied by him under license.

However, an examination of all the important cases in point decided before 1917 indicates that the English Courts have been careful to limit, rather